In the case at bar, Iacullo had been validly arrested under a pending warrant and he was in custody when his fingerprints were taken. There was sufficient evidence to indicate that he did not in any way object when requested to permit his fingerprints to be taken.

Defendant relies principally upon *United States* v. *Di-Re*, 332 U. S. 581. However, in that case the decisive evidence upon which defendant was convicted of knowingly possessing counterfeit gasoline ration coupons in violation of § 301 of the Second War Powers act, 1942[2], was that obtained by search of his person, after he was arrested without a warrant of any kind. The court, speaking of the defendant, said at 587:

> "If he was lawfully arrested, it is not questioned that the ensuing search was permissible."

In the case at bar, Iacullo was lawfully arrested before his fingerprints were taken. A warrant had theretofore been issued for his arrest and the morning following his arrest the marshal read the warrant to him.

In *Holt* v. *United States*, 218 U. S. 245, 54 L. Ed. 1021, one in custody on a charge of murder objected that evidence that he put on a blouse and that it fitted him, was inadmissible because he had put the blouse on under duress. However, at page 252, the court in rejecting the contention, said:

> "But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

[2] 50 U. S. C. App. (Supp. V, 1946), § 633.

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We hold that under the circumstances proved, Iacullo's constitutional rights were not violated when his fingerprints were taken and at the trial used as a basis for comparison with fingerprints found on newspapers used to wrap narcotics.

(b) Defendant objected at the trial to the introduction of evidence concerning the transaction on September 18, 1953, because he contends that "the indictment gives no notice of any such offense or occurrence by any allegation of act or deed, other than the general charge of conspiracy." He claimed surprise upon the offer of this proof. However, the court admitted it. He argues that the only evidence connecting him with that transaction was the presence of his fingerprint upon the newspaper used concealing the narcotics which Coduto sold to Mattera. His counsel admits that the government gave notice by delivering a photograph of a fingerprint to defendant's counsel prior to the trial, which bore the inscription "on September 18, 1953, Pinna and Coduto," and also "middle finger—RT. Hand." There was no surprise.

A complete offense was proved to have been committed on September 18, 1953. Iacullo was not charged with or found guilty of that offense. However, the similarity of the manner in which that offense was committed, being in remarkable conformity to the pattern of other transactions which were involved in the conspiracy charged against him, made this evidence admissible.

As a general rule, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible. As was said in *Bracey* v. *United States*, 142 F. 2d 85, at 87, this rule is subject to some well established exceptions. For instance, such evidence is admissible if it is so related to or connected with the crime

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charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive.

As to the conspiracy count, proof of the September 18, 1953 offense was admissible as corroborative of other evidence received to prove that count, because the pattern of that transaction bore a strong resemblance to the pattern of other transactions proved to have taken place in carrying out the conspiracy. The evidence as to September 18, 1953, was cumulative, as well as corroborative. In addition to that, the presence of Iacullo's fingerprint in the September 18, 1953 transaction was also admissible as tending to show his participation in the acts stated in count 16 to be objects of the conspiracy. For instance, the December 9, 1953 transaction also involved Iacullo's fingerprints[3]. He disclaims any criminal connection with that event. The evidence of September 18, 1953 tends to rebut that contention.

(c) Defendant also contends that the district court erred in admitting evidence of conversations out of the presence of Iacullo, referring particularly to the conversation related by Mattera as having occurred on August 13, 1953, between him and Coduto (who, like Pape, was overtaken by death before the trial), at which time Coduto said he could not fill Mattera's order for narcotics "because the fellows were out of town" meaning "The fellows that were in the car the other day, the other time."

When this evidence was received, the government had already proved a *prima facie* case of conspiracy as charged in count 16. For that reason this evidence was admitted

[3] Iacullo has never disputed that any of the fingerprints in evidence are his.

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by the district court. We believe that the court was not in error in so doing. See *Braatelien* v. *United States,* 147 F. 2d 888, where the court said, at 893:

> "Upon the trial several farmers testified that when Bergen solicited them to file petitions under the Act with Braattelien he, Bergen, made statements which, if true, implicated Braatelien in the conspiracy. All such declarations were objected to as hearsay because made in the absence of Braatelien. * * * It is the law also, that when a conspiracy is established *prima facie* everything said or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said or done by every one of them, and is admissible against each of them. 11 Am. Jur., Conspiracy, § 40. The declarations of each of the parties is a part of the *res gestae. Wiborg* v. *United States,* 163 U. S. 632, 657, 16 S. Ct. 1127, 1197, 41 L. Ed. 289. Each conspirator is in law a partner and agent of every other member of the conspiracy. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461."

2. The burden was upon the government to prove the conspiracy charged in count 16 by either direct proof or circumstantial evidence, or both.

As direct proof, it introduced the sworn testimony of witnesses indicating that illegal sales of narcotics were made by the alleged conspirators Coduto, Sperna, Schullo and Pape, each always acting in concert with some of the others named. In addition, direct evidence also showed Iacullo's repeated appearances with various of the alleged co-conspirators under circumstances from which it could be reasonably inferred that he was actively engaged in the furtherance of the conspiracy. For instance, it was proved that on July 23, 1953, as a Plymouth car was driven alongside a government agent's Cadillac in the parking lot,

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Coduto, who had that evening arranged for the sale of narcotics to the agent, pointed toward the Cadillac and said, "There they are now," and that Iacullo was present in the car with Sperna when the latter made the delivery in a highly suspicion-invoking manner and while Sperna drove around in the vicinity of the place of delivery with the obvious purpose of observing that the package was picked up. On October 14, 1953, when Schullo, with Coduto in his car, parked it, Coduto left and Iacullo entered the car. Schullo then drove to a point near Sperna's home and Schullo and Iacullo talked in the car until Sperna appeared. Iacullo left the car and joined Sperna for a conversation, waving to Schullo who thereupon drove away. Iacullo and Sperna then went to a luncheonette. On February 18, 1954, Sperna drove Iacullo to the building where Pape's mother lived,[4] and Iacullo entered the building. Ten or fifteen minutes after he returned to Sperna's car and was driven away, Pape came out of the building.

Circumstantial evidence tending to indicate that Iacullo handled the newspaper wrappings of the deliveries made pursuant to two of said sales was introduced in the form of testimony that his fingerprints appeared thereon.

After the government had laid a foundation by establishing a *prima facie* case of conspiracy, the district court received direct testimony that on August 13, 1953, Coduto explained that he could not then fill an order for heroin because "the fellows that were in the car the other day, the other time" were out of town.

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[4] Defendant contends that this evidence was inadmissible because this occurred "some 60 days after the completion and attainment, so far as any proof is concerned, of any object of the conspiracy, as laid in the indictment." This objection is not well taken because the conspiracy charged in the 16th count was a joint venture continuing until March 16, 1954, when the conspirators were arrested. The February 18, 1954 occurrence was incidental to the carrying out of the conspiracy itself and proof thereof was admissible.

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It is the contention of defense counsel that, despite the foregoing evidence, Iacullo was innocent of any participation in the sales of narcotics. Indeed that is the tenor of Iacullo's testimony at the trial. It became a question of fact for the district court to determine whether the direct evidence and the reasonable inferences to be drawn from the circumstantial evidence were to be accepted as guilt of Iacullo or his testimony to the contrary was to be accepted. The court, who observed Iacullo and the other witnesses testify, was in a better position than we to determine this question. We cannot say that the court was in error in coming to the conclusion that the evidence proved him guilty beyond a reasonable doubt. Iacullo's repeated personal appearances with those then engaged in executing the conspiracy, together with fingerprint evidence that he personally handled the wrappings of narcotics illegally peddled by the conspirators, he now attempts to explain on the theory of innocent coincidence. We reject that explanation, as did the district court.

In reviewing the record we may not weigh the testimony or determine the guilt or innocence of Iacullo. We must take that view of the evidence most favorable to the government to sustain the finding of the district court, there being substantial evidence to support it. In *Braatelien* v. *United States*, 147 F. 2d 888, at 893, the court said:

> "The existence of the conspiracy and the participation of the defendants need not be established by direct proof. Circumstantial evidence is sufficient when the facts and circumstances are such as legitimately tend to sustain an inference of their existence. '• • • generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances.' *United States* v. *Manton, supra*, 107 F. 2d 834 at page 839."

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The existence of the conspiracy and the participation of Iacullo therein are established by proof, both direct and circumstantial. The evidence supports the finding of guilty in count 16 and the judgment thereon.

3. We find it unnecessary to consider any question as to the sufficiency of the evidence to support the conviction of Iacullo under the six counts charging him with substantive offenses, inasmuch as the sentences imposed upon him on each of said counts and on the conspiracy count were the same and were ordered to run concurrently. In *Abrams* v. *United States*, 250 U. S. 616, 63 L. Ed. 1173, at 1176, the court said:

> "We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. *Evans* v. *United States*, 153 U. S. 608, 38 L. ed. 839, 14 Sup. Ct. Rep. 939; *Claasen* v. *United States*, 142 U. S. 140, 35 L. ed. 966, 12 Supp. Ct. Rep. 169; *Debs* v. *United States*, 249 U. S. 211, 216, *ante*, 566, 569, 39 Sup. Ct. Rep. 252."

To the same effect are *Sinclair* v. *United States*, 279 U. S. 263, at 299, and *Brooks* v. *United States*, 267 U. S. 432 at 441.

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For the reasons herein stated, the judgment from which Iacullo has appealed, is

AFFIRMED.

Judge FINNEGAN concurs in the result.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment and Orders of Court of Appeals.

Judgment entered November 7, 1955, affirming judgment of District Court.

Order entered November 25, 1955, denying Petition for Rehearing.

Certificate of Clerk of Court of Appeals for Seventh Circuit, dated December 2, 1955.

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